SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 159.

ABRAM P. THOMPSON, PLAINTIFF IN ERROR,

vs.

JOSEPH J. DARDEN, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

I.

HOW THIS CASE ARISES.

The schooner "William Neely," of the State of Maine, while sailing "*inward bound from sea*" to the port of Norfolk, Virginia, was spoken at sea by Joseph J. Darden, a licensed pilot of Virginia, with "*Cape Henry bearing west of south*," and the pilot "*offered his services to Norfolk.*" The schooner did not have "a pilot license," nor was she a coastwise sea-going steam vessel entitled to be under the control and direction of a pilot licensed by the United States. Under the Virginia Code, with reference to compulsory pilotage, it was the duty of the master of the schooner to accept the services tendered; but he refused to do so, and became thereby bound

to "*immediately pay to the said pilot full pilotage*" (Code of Va., section 1965).

Compelled to sue to secure his rights, Darden, the pilot, brought an action of trespass on the case *in assumpsit* in the Court of Law and Chancery of the City of Norfolk against Thompson, the master of the schooner, for his fees, amounting to $87.75, and Thompson demurred to the declaration.

The demurrer contained seven particulars of assignment against the validity of the Virginia statute, and as they are the basis and groundwork of the attack against the pilot law of Virginia now being made in this court, we will quote them here at length.

1. It (the Virginia pilot law) is in conflict with section 9, article I, of the United States Constitution, wherein it is provided that:

> "No preference shall be given by any regulations of commerce or revenue to the ports of one State over those of another."

2. It is in conflict with section 4237 of the United States Revised Statutes, which provides:

> "No regulations or provisions shall be adopted by any State which shall make any discrimination in the rates of pilotage or half pilotage between vessels sailing between the ports of one State and vessels sailing between the ports of different States, or any discrimination against vessels propelled in whole or in part by steam, or against national vessels of the United States; and all existing regulations or provisions making any such discrimination are annulled and abrogated."

3. It is in conflict with article IV, section 2, paragraph 1, of the United States Constitution, wherein it is provided that the citizens of each State shall be entitled to all privileges and immunities of citizens of the several States.

4. It is in conflict with section 1 of the fourteenth amendment to the United States Constitution, which provides that no State shall make or enforce any law which will abridge the privileges or immunities of citizens of the United States.

5. It is in conflict with section 4236 of the United States Revised Statutes, which provides as follows:

> "The master of any vessel coming into or going out of any port situate upon waters which are the boundary between two States, may employ any pilot duly licensed or authorized by the laws of either of the States bounded on such waters, to pilot the vessel to or from such port."

6. It is in conflict with article I, section 8, paragraph 3, of the United States Constitution, which provides that Congress shall regulate the commerce among the several States and with foreign nations, and that no State shall lay any duty on tonnage.

7. It is in conflict with the act of December 1 [21], 1898, respecting licensed officers on sailing vessels of over 700 tons.

The judge of the Court of Law and Chancery of the City of Norfolk gave judgment on the demurrer in favor of the defendant below (the plaintiff in error here). From that judgment Darden obtained a writ of error from the Supreme Court of Appeals of Virginia.

Upon a hearing in the Supreme Court of Appeals, that court unanimously reversed the Court of Law and Chancery of the City of Norfolk, overruled the demurrer, and remanded the case for further proceedings.

Record, p. 18.

When the case came on again to be heard in the Court of Law and Chancery of the City of Norfolk, the defendant therein

(the plaintiff in error here) offered no evidence and made no defense on the merits. He simply prayed an instruction directing a verdict in his favor, which the court refused. And upon a verdict of a jury in favor of the plaintiff for the sum mentioned in the declaration, the defendant moved the court to set aside the verdict and grant him a new trial. This motion the court overruled and entered judgment upon the verdict. The defendant thereupon tendered his bills of exception to the rulings of the court.

Record, pp. 24, 25, 26.

The defendant then presented his petition for a writ of error from the Supreme Court of Appeals to the Court of Law and Chancery of the City of Norfolk, but his petition was rejected and the writ of error refused.

Record, pp. 28–29.

This being a judgment of the highest court of law in the State in which a decision of the case could be had, and there being drawn in question the validity of a statute of the State on the ground of its being repugnant to the Constitution of the United States, and the decision of the said court being in favor of the validity of the statute, the defendant below filed his petition for writ of error to this court, attaching thereto an assignment of errors which are identical in effect with the particulars of assignment filed with his demurrer to the declaration in the Court of Law and Chancery of the City of Norfolk, and which have been set out at length.

Record, pp. 30–31.

The writ of error was ordered issued by the Supreme Court of Appeals of Virginia, and the case is now before this court in pursuance thereof.

Record, pp. 32–33.

II.

THE ALLEGED ERRORS WHICH ARE ABANDONED.

The plaintiff in error practically abandons in his brief (see page 5) his contention that the Virginia pilot law is invalid because of its alleged violation of the provisions of law enumerated in his assignment of errors under headings 3, 4, 6, and 7 (*ante*, p. 2). Indeed, he might well do so, for this court, in a case decided at the present term, concludes this case, so far as three of them are concerned.

See Olsen *vs.* Smith (not yet reported).

And the fourth is equally untenable.

(1.) *As to the third and fourth specifications of error:*

The plaintiff in error alleges as his third and fourth specifications of error:

> "3. It is conflict with article IV, section 2, paragraph 1, of the United States Constitution, wherein it is provided that the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States."
>
> * * * * * * *
>
> "4. It is in conflict with section 1 of the fourteenth amendment to the United States Constitution, which provides that no State shall make or enforce any law which will abridge the privileges or immunities of citizens of the United States; and which forbids any State from depriving any person of life, liberty or property without due process of law."

These two specifications of error are effectively disposed of in *Olsen vs. Smith* (not yet reported). Mr. Justice White, delivering the opinion of the court, said:

> "It remains only to consider the contentions based upon the fourteenth amendment and the anti-trust

laws of Congress. The argument is, that the right of a person who is competent to perform pilotage services to render them is an inherent right guaranteed by the fourteenth amendment, and that therefore all State regulations providing for the appointment of pilots and restricting the right to pilot to those duly appointed, are repugnant to the fourteenth amendment. But this proposition in its essence simply denies that pilotage is subject to governmental control, and therefore is foreclosed by the adjudications to which we have previously referred."

(2.) *As to the sixth specification of error:*

The plaintiff in error alleges as his sixth specification of error:

"6. It is in conflict with article I, section 8, paragraph 3, of the United States Constitution, which provides that Congress shall regulate the commerce among the several States and with foreign nations, and that no State shall lay any duty on tonnage."

This specification of error is also effectively disposed of by *Olsen vs. Smith*, Mr. Justice White on this point saying:

"The first contention in effect is that the State was without power to legislate concerning pilotage, because any enactment on that subject is necessarily a regulation of commerce within the provision of the Constitution of the United States. The unsoundness of this contention is demonstrated by the previous decisions of this court, since it has long since been settled that even although State laws concerning pilotage are regulations of commerce, 'they fall within that class of powers which may be exercised by the States until Congress has seen fit to act upon the subject' (Cooley *vs.* The Board of Wardens, 12 How., 299; *Ex parte* McNeil, 13 Wall., 237; Wilson *vs.* McNamee, 102 U. S., 572)."

(3.) *As to the seventh specification of error:*

The plaintiff in error alleges as his seventh specification of error:

> "7. It is in conflict with the act of December 1 [21], 1898, respecting licensed officers on sailing vessels of over 700 tons."

The sections of the act of December 21, 1898, needful to be considered are as follows:

> "SEC. 4438. The boards of local inspectors shall license and classify the masters, chief mates, and second and third mates, if in charge of a watch, engineers, and pilots of all steam vessels, and the *masters* and *chief mates* of sail vessels of over seven hundred tons and all other vessels and barges of over one hundred tons burden carrying passengers for hire. It shall be unlawful to employ any person, or for any person to serve, as a master, chief mate, engineer or pilot of any steamer or as master or chief mate of any sail vessel of over seven hundrod tons who is not license by the inspectors; and any one violating this section shall be liable to a penalty of one hundred dollars for each offense."
>
> * * * * * * *
>
> "SEC. 4439. Whenever any person applies to be licensed as *master* of a steam vessel, or of a sail vessel of over seven hundred tons, the inspectors shall make diligent inquiry as to his character, and shall carefully examine the applicant as well as the proofs which he presents in support of his claim, and if they are satisfied that his capacity, experience, habits of life, and character are such as warrant the belief that he can safely be intrusted with the *duties* and responsibilities *of the station for which he makes application*, they shall grant him a license authorizing him to *discharge such duties* on any such vessel for the term of five years."
>
> * * * * * * *
>
> "SEC. 4440. Whenever any person applies for authority to be employed as *chief mate* of ocean or

> coastwise steam vessels or of sail vessels of over seven hundred tons, or as second or third mate of ocean or coastwise steam vessels, who shall have charge of a watch, or for authority to be employed as mate of river steamers, the inspectors shall require satisfactory evidence of the knowledge, experience and skill of the applicant in lading cargo and in handling and stowage of freight, and if for license as chief mate on ocean or coastwise steamers, or of sail vessels of over seven hundred tons, or as second or third mate of ocean or coastwise steamers, who shall have charge of a watch, shall also examine him as to his knowledge and ability in navigation and managing such vessels and all *other duties pertaining to his station*, and if satisfied of his qualifications and good character they shall grant him a license *authorizing him to perform such duties* for the term of five years upon the waters upon which he is found qualified to act." * * *

An inspection of these sections will disclose the fact that they have no reference whatever to pilots of sailing vessels, or to pilotage at all. They simply provide for the examination and licensing of *masters* and *chief mates* on such vessels, and the licenses issued to such as are found competent only authorize such persons to perform the duties of the position for which they are licensed.

Thus it remains for us to discuss the subject only with reference to the three grounds relied on by the plaintiff in error and discussed in his brief filed in the case.

III.

ALLEGED ERRORS RELIED ON BY THE PLAINTIFF IN ERROR.

The record discloses that the plaintiff in error, in prosecuting his petition for writ of error, assigned two errors in the judgment of the supreme court of appeals of Virginia. Each of these alleged errors is based on the plaintiff in

error's contention that the Virginia pilot law is in contravention of the Constitution of the United States and of certain acts of Congress; and he enumerates four clauses of the Constitution and three acts of Congress which he alleges to be violated by the said law (*ante*, p. 2).

He states in his brief, however (page 5):

> "Of these it is proposed to discuss only the first, second and fifth."

The inference is evident that these points are the only ones upon which he intends to rely. They are as follows:

I. It (the Virginia pilot law) is in conflict with section 9, article I, of the United States Constitution, wherein it is provided that:

> "No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another."

II. It is in conflict with section 4237 of the United States Revised Statutes, which provides:

> "No regulations or provisions shall be adopted by any State which shall make any discrimination in the rates of pilotage or half pilotage between vessels sailing between the ports of one State and vessels sailing between the ports of different States, or any discrimination against vessels propelled in whole or in part by steam, or against national vessels of the United States; and all existing regulations or provisions making any such discrimination are annulled and abrogated."

III. It is in conflict with section 4236 of the United States Revised Statutes, which provides as follows:

> "The master of any vessel coming into or going out of any port situate upon waters which are the boundary between two States, may employ any pilot duly licensed or authorized by the laws of either of the States bounded on such waters, to pilot the vessel to or from such port."

IV.

THE FIRST ERROR RELIED ON: THAT ARTICLE I, SECTION 9, CLAUSE 6, OF THE FEDERAL CONSTITUTION IS VIOLATED.

The first alleged error which the plaintiff in error contends for, and argues in his brief, is that clause 6, section 9, article I, of the Constitution of the United States, providing that:

> "No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another"—

is violated by the Virginia law concerning pilotage; and on page 9 of his brief he asserts that this clause of the Constitution "applies both to Federal and State legislation; and he cites, to sustain the proposition, *Passenger Cases*, 7 How., 414 (1849).

An inspection of these cases will show that the real question involved therein was not section 9, but the commerce clause of section 8, of the Constitution. The cases were decided by a bare majority of the court, and the reporter naively states in the head-note:

> "Inasmuch as there was no opinion of the court, as a court, the reporter refers the reader to the opinions of the judges for an explanation of the statutes and the points in which they conflicted with the Constitution and laws of the United States."
>
> Passenger cases, 7 How., 283.

Eight separate opinions were handed down in the cases and reference to the scope of the clause of section 9 in question is made in only two of them.

Justice Wayne, on page 414, said:

> "I *think* the court means to decide * * * that the sixth clause of the ninth section of the first article of the Constitution, * * * is a limitation upon

> the power of Congress to regulate commerce for the purpose of producing entire commercial equality within the United States, and also a prohibition upon the States to destroy such equality by any legislation prescribing a condition upon which vessels bound from one State shall enter the ports of another."

And Justice McLean, at page 406, speaking of section 9 of the Constitution, among others, said:

> "These provisions impose restrictions on the exercise of the commercial power, which is exclusively vested in Congress; and it is as binding on the States as any other exclusive power with which it is classed in the Constitution."

The only other case cited by the plaintiff in error to sustain his proposition is Williams *vs.* The Lizzie Henderson, Fed. Cas. No. 17726*a* (1880). That case, decided by Locke, District Judge, relied upon the authority of the Passenger Cases. It is true that he cites other cases in support of his conclusion, but an examination of them shows that their decisions have been misapprehended. Inman *vs.* Tinker, 94 U. S., 238, which Judge Locke quotes from, was a case dealing entirely with restrictions upon State legislation contained in section 10, article I, of the Constitution. And Mr. Justice Swayne, who delivered the opinion of the court, specifically stated that the decision was confined to the scope of clause 3 of section 10. And the very quotation which Judge Locke uses from Ward *vs.* Maryland, 12 Wall., 431 (another case relied on by him), shows that clause 6 of section 9 was there regarded, though not the point involved in the case, as a restriction upon Congress only.

So that the only authority advanced for the proposition is an old case, of doubtful authority, even if it had not been repudiated by subsequent decisions of this court, as it has been.

In Munn *vs.* Illinois, 94 U. S., p. 135 (1876), it was said:

> "The remaining objection, to wit, that the statute in its present form is repugnant to section 9, art. I, of the Constitution of the United States, because it gives a preference to the ports of one State over those of another, may be disposed of by the single remark that this provision operates only as a limitation of the powers of Congress, and in no respect affects the States in the regulation of their domestic affairs."

And in Morgan *vs.* Louisiana, 118 U. S., p. 467 (1886), the court said:

> "The ninth section, including the above paragraph (6), is in like manner devoted to restraints upon the power of Congress and of the National Government; and the tenth section contains only restraints upon the powers of the States, by declaring what they shall not do. The most casual inspection shows this and the clause of the Constitution here relied on is not found among the restrictions of the States, but among those imposed upon the Federal Government."
>
> See also Johnson *vs.* Chicago, 119 U. S., p. 400.

Mr. Black, the author of an excellent work on constitutional law, says:

> "* * * The various clauses of the Federal Constitution which impose restrictions, limitations, or prohibitions upon the exercise of legislative power were designed, generally, to guard the rights of the people against oppression on the part of that Government which the Constitution created, not against their own States. They are therefore to be considered as applicable only to the Federal Government, except in those cases where the States are explicitly mentioned."
>
> Black's Constitutional Law (2d ed.), pp. 303–'4.

And Mr. Justice Miller, in his lectures on the Constitution of the United States, says:

> "Section 8 of the first article is devoted to the grant of powers to the legislative branch of the Government

> of the United States; section 9 is devoted to the restrictions upon *those powers*, and section 10 to express limitations upon the powers of the States."
>
> Miller on the Constitution of the U. S., p. 576.

Thus it would seem plain that the inhibition of clause 6, section 9, article I, of the Constitution has no reference to State legislation; and, since it is a State law that is under consideration in this case, that clause of the Constitution is in no way involved.

Nor can it be justly urged that the State law in question is, by act of Congress of 1789 (sec. 4235, Revised Statutes), adopted in such manner as to make it a *quasi* Federal law; and that, as such, the constitutional provision now being considered is applicable thereto, as it is to acts of Congress generally. That section provides as follows:

> "Until further provision is made by Congress, all pilots in the bays, inlets, rivers, harbors and ports of the United States shall continue to be regulated in conformity with the existing laws of the States respectively wherein such pilots be, or with such laws as the States may respectively enact for the purpose."

The effect of this section was to leave the matter of pilotage to be dealt with by the several States within the limitations of their rights and powers as prescribed by such provisions of the Constitution of the United States as applied to them. As was said in Cooley *vs.* The Board of Wardens, above cited:

> "Whatever subjects of this power are in their nature national, or admit of one uniform system or plan of regulation may justly be said to be of such a nature as to require exclusive legislation by Congress. That this cannot be affirmed of laws for the regulation of pilots and pilotage is plain. The act of 1789 contains a clear and authoritative declaration by the first Congress that the nature of this subject is such that until Congress should find it necessary to exert its powers it should be left to the legislation of the States; THAT

> IT IS LOCAL AND NOT NATIONAL; that it is likely to be best provided for, not by one system or plan of regulation, but by as many as the legislative discretion of the several States should deem applicable to the local peculiarities of the ports within their limits."

Whatever attack, therefore, may be made upon the constitutionality of the Virginia pilotage law, it must be based upon some other ground than that it is rendered void by the provisions of section 9, article I, of the Federal Constitution.

V.

THE SECOND SPECIFICATION OF ERROR.

The Federal and State Statutes.

The second specification of error argued in the brief of the plaintiff in error (pp. 3, 11–22), is that the Virginia pilot law is in conflict with section 4237 of the United States Revised Statutes.

Section 4237, U. S. Revised Statutes, is as follows:

> "No regulations or provisions shall be adopted by any State which shall make any discrimination in the rates of pilotage or half pilotage between vessels sailing between the ports of one State and vessels sailing between the ports of different States, or any discrimination against vessels propelled in whole or in part by steam, or against national vessels of the United States; and all existing regulations or provisions making any such discrimination are annulled and abrogated."

This is the enactment under which it is alleged Darden's claim is void, for the reason that a discrimination against its terms is contained in the Virginia statute. Section 4237 (just quoted) concerns simply "*the rates of pilotage*," and prohits any discrimination "*in the rates of pilotage*"—

(1.) "Between vessels sailing between the ports of one State, and vessels sailing between the ports of different States."

(2.) Against vessels propelled in whole or in part by steam.

(3.) Against national vessels of the United States.

A discrimination of any one of these three descriptions is denounced by Congress; and if it could be found, and were applicable in this case, it would be confessedly fatal to Pilot Darden's claim.

But it cannot be found.

Obviously there is no discrimination in the Virginia statutes against vessels propelled in whole or in part by steam, or against national vessels, and the case is stripped, so far as the Federal statutes are concerned, of all questions save that stated under (1), above.

State and Federal Legislation as to Pilotage.

The earliest statutory enactment on the subject of pilotage in Virginia was adopted by the "Grand Assembly, held at James City, Va., March 32d, 1660–1," in the thirteenth year of Charles II—nearly two hundred and fifty years ago. That early act appointed one William Oewin as "cheife pilott" and compelled all vessels above a certain tonnage to accept his services as pilot, or, upon refusal, to pay him "*fourty* shillings."

See 2 Hening's Statutes at Large, 39.

And in May, 1755, the Colonial General Assembly of Virginia at Williamsburg passed an act entitled "An act for establishing pilots and regulating their fees."

In the preamble it was recited that:

> "Whereas, *it is necessary for the safety and preservation of ships and vessels coming into the bay of Chesa-*

> *peake*, bound up the rivers of this dominion, that able and experienced pilots should be, to conduct such vessels to their several moorings, and to prevent ignorant or unqualified persons from undertaking such pilotage, be it therefore enacted, etc."

And it was enacted (amongst other things) that:

> "All pilots shall keep a good lookout and that *every master of a merchant's vessel coming from sea shall be obliged to receive the pilot who first offers to conduct his vessel*, or shall pay him half pilotage; and then may continue the same, or choose another pilot, or proceed without a pilot if he sees fit" (6 Hening's Statutes at Large, pp. 490–491).

So that the very question now here might have arisen under the colonial act of 1755 if only it were in effect today; and since that day of 1755 when the colonial act was passed up to this day there has not been a single day when such a vessel as the "William Neely" could enter the Chesapeake bay from sea through the inlet or channel between Capes Charles and Henry without being compelled by law to pay a pilot's fees.

When the Constitution of the United States was adopted, with the power therein conferred upon Congress to "regulate commerce with foreign nations and among the several States" (art. I, sec. 8), jurisdiction was thereby conferred upon Congress to regulate pilotage in the navigable waters of the United States, for, as said by the Supreme Court of the United States:

> "Pilot regulations are regulations of commerce. A pilot is as much a part of the commercial marine as the hull of the ship and the helm by which it is guided; and half pilotage, as it is called, is a necessary and usual part of every system of such provisions." *Ex parte McNeil*, 13 Wall., 238.

The First Federal Act of 1789.

Congress soon met its responsibility and exercised its power by enacting, as early as 1789, what is now section 4235 of the Revised Statutes of the United States, and which reads as follows:

> "Until further provision is made by Congress, all pilots in the bays, inlets, rivers, harbors and ports of the United States shall continue to be regulated in conformity with the existing laws of the States respectively wherein such pilots be, OR WITH SUCH LAWS AS THE STATES MAY RESPECTIVELY ENACT FOR THE PURPOSE."

"The bays, inlets, rivers, harbors, and ports of the United States," these and all of them everywhere in the United States, are thus by act of Congress placed under the pilotage laws "*of the States respectively wherein such pilots be;*" and showing the forecast, as well as the then practical wisdom of that body, it added the words: "*or with such laws as the States may respectively enact for the purpose.*"

As said by Locke, J., in a district court of the United States:

> "leaving the entire matter to the local boards, as had been the case under three-fourths of all the previous legislation on the subject, was without doubt the quickest and most satisfactory manner of settling it" (Locke, D. J., in *The Chase*, 14 Fed., 854).

That "quickest and most satisfactory" manner of settlement by the local State boards remains today in vogue, and is in itself, and its long-lived usefulness, its own best eulogy.

The Composite Federal and State System of Pilotage.

Thus was created the composite system of pilotage that has existed in the United States for one hundred and fourteen years, and which, based upon the soundest principles of American democracy, represents alike the cherished sentiment of home rule, the practical wisdom that gave rise to it, and the benignant influence of the General Government in harmonizing local differences and conflicts.

Time and again has the Supreme Court of the United States approved this composite system as both constitutional and wise, and pointed out the necessity and expediency of pilotage laws being based on, and drawing their shape and plan from, the local conditions of separate jurisdictions and territories. In its view a diversity of plans must be provided for diverse conditions, and that diversity is not "discrimination" is a proposition too patent to need its sanction. But we defer citation of authorities until analysis has demonstrated the necessity of the doctrines which they respond to.

The Virginia Statutes.

The existing Virginia statutory law that bears on this case is contained in the Code of 1887, page 495 to page 501, inclusive. The pertinent sections are now cited, beginning with section 1965, which is entitled "*What vessels are to take pilots and where,*" which reads:

> "SEC. 1965. *What vessels are to take pilots and where.*—The master of every vessel (other than a coasting vessel having a pilot license), inward bound from sea, shall take the first Virginia pilot that offers his services, Cape Henry bearing west of south, to Smith's Point, Yorktown, Newport News, or Norfolk, or any intermediate point; and any such vessel, outward bound, shall take the first pilot that offers his services at Smith's Point, Yorktown, Newport News, or Norfolk,

or any intermediate point, to sea; and any master, refusing to do so, shall immediately pay to said pilot full pilotage from the sea to Newport News, Smith's Point, Yorktown, or Norfolk, or from said ports to sea, as the case may be; but no master of a vessel coming from sea shall be compelled to take a pilot after arriving within the line at which Cape Henry bears west of south: *Provided, however*, That any registered vessel arriving within the line of Cape Henry, bearing west of south, without having taken a pilot, bound for Norfolk, Newport News, or Richmond, shall not be liable for pilotage; but the master may pilot his own vessel to Hampton Roads, and there employ any steamboat or towboat to tow his vessel to her port of destination: *Provided*, That in no instance shall any master be allowed to employ any steamboat or towboat below Hampton Roads without paying full pilotage to the first regular pilot that offers his services to said vessel; and any master so employing a steamboat or towboat below Hampton Roads without a pilot on board of such vessel, when one shall have offered his services, shall be liable to the penalty prescribed in section nineteen hundred and sixty-three (1963). This provision shall apply only to inward-bound vessels." *

It is not the vessel sailing inward through the Virginia capes and "*bound to*" Smith's Point, Yorktown, Newport News, or Norfolk, or any intermediate point *as its destination*, that is required to take a pilot and pay him, but it is "every vessel *inward bound* from sea" (other than a coasting vessel having a pilot's license), no matter what may be the port or point she is "*bound to*." She must take the pilot to disregard

* NOTE.—In the Virginia Code of 1873 it was provided, in chapter 91, section 12, page 772, that—

§ 12. The master of every vessel (other than a coasting vessel, *or a vessel four-fifths of which is owned by persons residing in Virginia*) inward bound from sea shall take the first Virginia pilot that offers his services, Cape Henry bearing west of south, &c.

In the acts of assembly of April 21, 1882 (see Acts of 1881-2, page 392), the italicised words "*or a vessel four-fifths of which is owned by persons residing in Virginia*" are omitted, and so they were likewise omitted in the Code of 1887.

"Smith's Point, Yorktown, Newport News, or Norfolk, or any intermediate point." Beyond these points up the Potomac from Smith's Point, up the York from Yorktown, up the James from Norfolk or Newport News, or up any river intermediate between the pilotage line of the capes and the designated points of pilotage, the taking of a pilot is optional with the master, if provided for at all, as hereafter noticed.

In connection with section 1965 there should be held in view section 1969 of the Code of Virginia, entitled—

"*Rates of Pilotage,*"

which section is as follows:

> "SEC. 1969. *Rates of pilotage.*—Pilots shall have pilotage at the following rates:
>
> "For every vessel owned by a citizen of the United States
>
> and for every vessel owned by a citizen or subject of any foreign State, whose vessels are by treaty placed on the same footing as vessels of the United States,
>
> if the vessel be spoken or boarded eastward of Cape Henry
>
> there shall be paid for each foot the vessel draws as follows:
>
> From sea to Smith's Point, West Point, Newport News or Norfolk,
>
> or any place between Smith's Point, West Point, Newport News or Norfolk,
>
> Vessels drawing ten feet and under, two dollars and fifty cents ($2.50);
>
> vessels drawing thirteen feet and over ten feet, three dollars ($3.00);

vessels drawing fourteen feet and over thirteen feet, three dollars and fifty cents each ($3.50);

vessels drawing sixteen feet and over fourteen feet, four dollars ($4.00);

vessels drawing over sixteen feet, four dollars and fifty cents ($4.50).

If the vessel be boarded or spoken twenty miles or more eastward of Cape Henry, twenty-five cents per foot shall be added to the foregoing rates.

There shall be paid the same pilotage from Smith's Point, West Point, Newport News, or Norfolk, or any intermediate point, to sea, as from sea to those places;

and from Newport News to Jamestown, or any place between Newport News and Jamestown, one dollar and thirty-five cents per foot ($1.35);

from Newport News to Richmond, or any place between Jamestown and Richmond, two dollars and fifty cents per foot ($2.50);

and the same rates of pilotage shall be paid from said places, respectively, down.

Vessels coming from sea to Hampton Roads and thence to any port in Maryland shall be subject to the same rate of pilotage as vessels bound from Newport News to sea.

All vessels coming to Hampton Roads, seeking, in ballast, shall only pay one-half pilotage in and one-half out:

Provided, however, That if such vessel coming to Hampton Roads, seeking, is afterwards chartered to load in any port or place in this State, she shall pay the usual pilotage in and out as though she had come to a direct port.

All steamers calling in any port or place in this State for the sole purpose of coaling shall only pay one-half pilotage in and one-half pilotage out.

All vessels that go from Norfolk to Newport News to load or finish loading, and all vessels that go from Newport News to Norfolk to load or finish loading, shall, if they take a pilot (which shall be optional with the master) pay a fee of ten dollars to the pilot for transporting any such vessel to or from either place."

For convenient reference we insert also the sections of the *Code 1963, 1966, 1978,* and *1990,* which directly bear on some parts of this discussion or shed light upon it.

"SEC. 1963. *Penalty for piloting, etc., vessel without authority, or employing unauthorized person as pilot; how offenders proceeded against.*—If any person not authorized by law, or any pilot, after removing from the State, undertake to conduct or pilot a vessel to or from sea; or to or from any port or place in Virginia; or, if any master or person on board any steamboat or towboat, tow a vessel to or from sea, or to or from any port or place in Virginia, except as authorized by this chapter, without having a pilot on board of such vessel (if one shall offer his services), he shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall, at the discretion of the jury, be imprisoned in jail not more than three months, or fined not exceeding two hundred dollars. Any master employing any person not authorized by law, or any pilot who has removed from the State, to act as pilot of his vessel, shall pay one hundred dollars to any regular branch pilot who shall sue for the same. Warrants for such offenders may be issued, upon the oath of any party complaining, by a justice of any county, or mayor or justice of any city, in this State, in which such offender may be at the time; and upon proof of probable cause, the offender shall be bound, with surety in due form of law, to appear at the next term of the circuit, county, or corporation court of said county or city, for trial of such misdemeanor; and the circuit, county, or corporation court of said county or city, shall have jurisdiction for the trial thereof."

* * * * * * *

"SEC. 1966. *Where employment of pilots not required.*—No master shall be required to have a pilot to conduct his vessel or steamboat above Newport News, Yorktown, Mobjack bay, Urbanna or Smith's Point, but he may, himself, or by any person regularly employed on board, pilot his own vessel, or he may employ the services of any towboat, to tow his vessel to her port of destination above any of the above-named points."

"SEC. 1967. *Issue of license to coasting vessel by pilots' agents at Norfolk and Richmond; pay of agents.*—Pilots shall appoint agents, one for Norfolk city and one for Richmond, who shall grant licenses to coasting vessels trading in all the rivers of this State; for which licenses such agents shall receive ten cents per ton for one year; and coasting vessels having such licenses shall be free to sail without pilots to or from sea; but all vessels sailing under a coasting license of the burden of seventy tons or more, coming from or going to sea, without having obtained a license from such agent, shall be subject to the same regulations and pilotage as registered vessels belonging to citizens of the United States."

* * * * * * *

"SEC. 1978. *Liability for pilotage.*—The master and the owner of every vessel shall each be liable to the pilot for his pilotage and other allowances, and also the consignee or supercargo of any vessel not owned by a citizen of the State; and if the said consignee or supercargo refuse to become responsible to the pilot for his fees, the master or owner of said vessel shall, before she leaves her port of departure, deposit with some responsible person, subject to the order of the pilot, the amount of the pilotage due him."

* * * * * * *

"SEC. 1990. *Vessels on Potomac excepted from pilotage.*—Nothing in this chapter shall be construed to apply to vessels bound for any point on the Potomac; and no vessel, bound to or from any point on the Potomac, shall be required to pay pilotage. But if she does take a pilot she shall pay the regular rate of pilotage to Smith's Point."

VI.

THE MAP OF VIRGINIA, AND ITS REFUTATION OF THE CHARGE OF DISCRIMINATION.

The map of Virginia disproves the assertion that there is any discrimination in the Virginia statutory law as to "*rates of pilotage*" in navigation, outward or inward bound, from or to the Chesapeake bay and the sea. Indeed, there is no discrimination of any kind as between "*vessels sailing between the ports of one State*" (Virginia), as one class, and "*vessels sailing between ports of different States*," as another class.

Looking first at the coast of Virginia, then at the channel, and then on the inland waters of Virginia which are reached by vessels inward bound, we discover that Virginia laws might comprehend:

1. *Seacoast pilotage*—that is, from port to port on the Virginia seacoast, or from a seacoast port of Virginia to the seacoast port of another State—is along the eastern boundaries of Accomac and Northampton counties, north of the Cape channel, and Princess Anne county, south thereof. No pilotage at all from port to port anywhere along this Virginia seacoast line of nearly one hundred miles, or from any port upon this coast to any other seacoast port anywhere, is required by Virginia, and consequently there can exist no discrimination for or against the ports of any State.

2. *Seacoast and sea pilotage*—that is, pilotage—

(1) *from the sea into a seaport of Virginia*, or

(2) *from a seacoast port of Virginia to a port over seas*,

is not required by Virginia, and hence no discrimination can exist in this respect.

3. *Seacoast and inward pilotage*—that is, pilotage—

(1) *from any port or point on the Virginia seacoast* (just as from any other exterior port),

(2) to any and all ports in Virginia inland waters through the Cape channel,

is required by Virginia *from any vessel "inward bound from sea" through the Cape channel to inland ports, no matter from what port it comes over seas, and no matter to what port it is bound inward.* The "SEA" or "OCEAN" means the great mass of waters that surround or encompass the land; and "THE HIGH SEAS" means the unenclosed waters of the ocean. They include the waters on the seacoast which are *without and seaward of low-water mark on the seacoast.*—Bouvier's Law Dictionary, High Seas and Sea.

Coastwise voyages are on the sea.

Coast Chart No. 131, sheet No. 1, of the United States Coast and Geodetic Survey, marks the delineations of the Chesapeake entrance, and shows that the line dividing the high seas from inland waters (including Chesapeake bay) runs from Cape Henry light to "outer entrance whistling buoy," and thence to Cape Charles light. So that every vessel entering Chesapeake bay is, until it crosses this line, on the high sea.

Thus it is clear:

(1.) That while coastwise pilotage from port to port,

(2) and pilotage from the coast outward over seas is not required by Virginia,

(3) Pilotage from any seacoast port IN VIRGINIA "inward bound from sea" is required, as from vessels from any other port, domestic or foreign; and also that—

(4) Pilotage from inland ports outward bound to sea is likewise required, and is simply the converse of pilotage from sea "inward bound."

These four species of pilotage—

(1) from seacoast port to seacoast port,

(2) from seacoast port outward bound to the port of some other State or nation,

(3) from sea inward bound through the capes,

(4) from within the capes outward bound,

are the only species of pilotage that pertain to the sea.

In the two species first mentioned there is no pilotage at all required, and in the two cases last mentioned there is no discrimination of any kind.

Illustrations.

1. Suppose a vessel at Chincoteague, on the Virginia seacoast of Accomac county, sails to Virginia beach, at the railway terminal in Princess Anne county. No pilotage is required.

2. Suppose a vessel sails from Delaware, New Jersey, New York, San Francisco, or Liverpool to Chincoteague or to Virginia beach. So of these no pilotage is required.

3. Suppose a number of vessels sail:

(1) One from Chincoteague, on the Virginia seacoast, inward bound to Norfolk, Virginia, within the Chesapeake bay.

(2) One from Virginia beach, on the Virginia seacoast, inward bound to Sewall's Point, Virginia, an intermediate point, en route to Norfolk.

(3) One from Assateague, Virginia seacoast, to Baltimore, Maryland.

(4) Suppose a number of other vessels from various American seaports of the Atlantic and Pacific coast, and from foreign countries, sail at the same time inward bound to ports within the Virginia capes—

in each and every case every one is (1) bound to pay pilotage to the Virginia pilot, and (2) at exactly the same rates.

So we may write Q. E. D. to the several propositions:

First. That all pilotage required by Virginia applies equally, impartially, and without discrimination to all vessels that come into Chesapeake bay from the sea, or go out of Chesapeake bay to the sea.

Second. That the inward-bound and outward-bound passages from and to the sea through the Virginia capes are the only passages that affect or pertain to the sea in which Virginia requires pilotage at all.

Third. That for the passage made by the schooner *William Neely*, of Maine, from sea to Norfolk, Virginia, no discrimination exists in Virginia law between the ports of Virginia or the ports of any one State as a class and the ports of different States as a class, and no discrimination as to "the rates of pilotage" is made.

Fourth. No exemption is made as to any port of any State or any nation with respect to pilotage through the channel between the capes.

Fifth. The *William Neely* is liable for and must pay the Virginia pilot's fees.

The fourth proposition is essentially the same as the third, though in a different form. It is put in the form of the third proposition because that follows the language of the Virginia Code.

It is put in the form of the fourth proposition because where a system of pilotage otherwise unobjectionable contains a specifically expressed exemption of vessels sailing from a particular State or port, it thereby indirectly creates a discrimination against vessels sailing from other States and other ports. When we come to consider inland pilotage we will again advert to this phase of the subject.

VII.

THE PILOTAGE SYSTEMS REQUIRE DIVERSITIES OF PLANS TO MEET LOCAL NECESSITIES, AND ARE LOCAL, NOT NATIONAL, IN THEIR NATURE.

The sovereign powers of government must of necessity, and in the nature of things, prescribe:

1. The class of vessels to be piloted,
2. The waters to be navigated with pilots,
3. The ports or points between which pilotage is to be provided,
4. The cases in which pilotage is compulsory under fitting penalties,
5. The cases in which pilotage is left optional with the master of the vessel, and
6. The charges or fees of pilotage which may be enforced,

and there are many other features of pilotage which come naturally, obviously, and justly under the regulation of the sovereignty having jurisdiction of the subject, such as the examination and appointment of pilots, and the various duties and obligations imposed on them and those dealing with them.

In respect to all of these matters Virginia has acted, prescribing *the class of vessels* to be piloted through the Cape channel, and making exceptions only of "coasting vessels having a pilot license." To this exception the United States by act of Congress has added others through its paramount power, and no violation of either the State or Federal exceptions appears.

No sort of discrimination is made in favor of or against any vessel, whether from a foreign port, an American port outside of Virginia, or a Virginia port. No exemption is made either directly or indirectly.

As to *the waters* to be piloted, Virginia, in her discretion, has not required coastwise pilotage on her seacoast, nor pilotage within her inland bays and rivers.

The ports and points between which the pilots are to conduct the vessels in their charge are pointed out either by specific designation or by inclusive description.

Vessels inward bound from sea are required to take pilots to "*intermediate points*" within Chesapeake bay, as well as to Smith's Point, at the extreme northern end of the bay on the Maryland line, where Virginia jurisdiction to compel pilots to be taken is ended; and "intermediate points" from the pilotage line between the capes to the Maryland line at Smith's Point embrace all Virginia ports or points on Chesapeake bay.

As to vessels bound to or from ports on the Potomac river no compulsory pilotage is provided for, because of the Federal statute which would, in effect, nullify any such provision. As to vessels of this class (bound to or from ports on the Potomac, which is a boundary between two States) Virginia has simply conformed her statute to the Federal statute, which is of superior force.

See Code of Va., section 1990.

Compulsory and Optional Pilotage.

As to optional pilotage.—The cases in which it is left optional are set forth in the Code as well as those in which it is compulsory; and it is proper to observe that—

(1) Compulsory pilotage only applies to passages through the capes between the sea and the bay ports,

(2) while optional pilotage applies in all other cases with which the pilot laws deal.

With these diverse plans has Virginia applied her sovereign discretion to meet "local necessities," and for so doing she has the double warrant of the act of Congress of 1789 and the judicial approval of the Supreme Court of the

United States declaring that act of Congress valid, and sustaining the State jurisdiction of the subject on all of her "*bays, inlets, rivers, harbors, and ports where her pilots be.*"

In *Cooley vs. Board of Wardens of the Port of Philadelphia*, 12 How., 299 (decided in 1851), that tribunal, in a clear and able opinion delivered by Judge Curtis, held valid the statute of Pennsylvania which required "every ship or vessel coming from or bound to any foreign port or place, or every ship of seventy-five tons or more sailing from or bound to any port NOT WITHIN THE RIVER DELAWARE," to receive a pilot, and imposing pilot fees for services rendered. By one section of the statute it EXEMPTED from both health and pilot charges "ALL VESSELS ENGAGED IN THE PENNSYLVANIA COAL TRADE."

Here was a statute applicable to vessels *coming from or going to sea*, to those of a certain tonnage only, and applicable also to ports "*not within the River Delaware*," exempting vessels in the Pennsylvania coal trade, which, notwithstanding its irregular and exceptional lines of operation, was held to be based on sound policy and to be within the purview of the Federal statute of 1789. That act of 1789 was held to contain a clear exposition of the Constitution by the first Congress to the effect that the power to regulate pilots was conferred on Congress by the Constitution, and in effect that the regulation of pilots was a regulation of commerce within the grant to Congress of that power contained in the third clause of the eighth section of article 1 of the Constitution. It further held that the States were not divested of the power to legislate on the subject by the grant of the commercial power to Congress (p. 318), and Judge Curtis said:

> "Now the power to regulate commerce embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, LIKE THE SUBJECT NOW IN

QUESTION, AS IMPERATIVELY DEMANDING THAT DIVERSITY, WHICH ALONE CAN MEET THE LOCAL NECESSITIES OF NAVIGATION" (p. 319).

This learned judge further said that:

> "until Congress shall have found it necessary to exert its power it should be left to the legislatures of the States;"

that—

> "it is local and not national, and it is likely to be best provided for not by one system or plan of regulation, but by as many as the legislative discretion of the several States deem applicable to the local peculiarities of the ports within their limits."

Here, too, was a statute that did not apply to ports "within the River Delaware," showing that the Pennsylvania legislature differentiated inland pilotage from that which related to waters over which vessels coursed to sea, just as the Virginia legislature has done, and covering, indeed, all the principles that are pertinent to this case.

Many cases have co-ordinated with this leading one, and the questions settled by it are no longer debatable, whether as to the constitutionality of our composite system of pilotage, which intermingles Federal and State statutes, or as to the power of the States under it to differentiate the plans adopted to meet the local necessities arising as to particular "bays, inlets, rivers, harbors, and ports." *Ex parte* McNeil, 13 Wall., 236; *Steamship Co. vs. Joliffe*, 2 Wall., 450; *Spraigue vs. Thompson*, 118 U. S., 90; *Olsen vs. Smith*, U. S. Sup. Ct. (not yet reported).

VIII.

VIRGINIA'S OPTIONAL AND INLAND PILOTAGE SYSTEM FOR RIVERS AND BAYS.

There is no pilotage *required* by Virginia from Virginia port to Virginia port on the Chesapeake bay or other bay; neither is any *required* from port to port on any Virginia river.

But if the master of the vessel chooses to employ a pilot in certain cases the fees of pilotage are fixed by section 1969 of the Code, which is entitled "Rates of pilotage," and simply expresses what they shall be where a pilot is taken. What vessel *must* take pilots, and *where*, is a matter covered by section 1965. The rates prescribed are:

(1.) From Newport News to Jamestown or any place between Newport News and Jamestown, per foot, $1.35.

(2.) From Newport News to Richmond or any place between Jamestown and Richmond, per foot, $2.50.

(3.) The same rates per foot from such places respectively down, $2.50.

(4.) All vessels coming to Hampton Roads, seeking, in ballast shall only pay half pilotage in and out.

(5.) If such vessels coming to Hampton Roads seeking are afterwards chartered to load in any port or place in Virginia she must pay the usual pilotage in and out (*i. e.*, in from sea or out to sea), as though she had come to a direct port.

(6.) All steamers calling in any port or place of Virginia *for the sole purpose of coaling* shall pay half pilotage in and half pilotage out.

(7.) All vessels that go from Norfolk to Newport News to load or to finish loading shall, if they take a pilot (which shall be optional with the master), pay a fee of ten dollars to the pilot for transporting such vessel to or from either place.

No kind of discrimination as to this State or any other State can be discovered in these provisions. They are simply local charges for pilotage like local charges for freight or passenger traffic by common carriers; fixed by the legislature of Virginia according to the nature of the case: without complaint from any source; with congressional sanction and with judicial approval; without exemption or differentiation save as to coaling vessels, and with that differentiation sanctioned by the Supreme Court of the United States in *Cooley vs. Board of Wardens*, 12 Howard, 299, heretofore cited.

The Provision of Section 1969 as to Vessels Incoming to Hampton Roads and Bound Thence to Maryland.

One other item of section 1969 remains to be noticed. It is this:

> "Vessels coming from sea to Hampton Roads and thence to any port in Maryland shall be subject to the same RATES OF PILOTAGE as vessels bound from Newport News to sea."

Many considerations support this item.

1. It is only the Virginia "*rates of pilotage*" that the vessel lying in Hampton Roads and sailing to a Maryland port is subjected to. It is not subjected to any *compulsion* to take a pilot.

2. If the vessel were to go to Maryland from Hampton Roads or a Virginia seacoast point, such as Virginia Beach, or to Delaware, New Jersey, or to any other State, she would have to pay pilotage through the Cape channel—no matter what port or what State she started her voyage from. So, if she goes to Maryland from Hampton Roads after coming from sea, whether

(1) she started her voyage from Chincoteague, in Accomac county, Virginia, or Virginia Beach, in Princess Anne county, Virginia, or any other Virginia seacoast port;

(2) or started from any other State in the Union of the Atlantic or Pacific States;

(3) or started from any port anywhere the wide world over outward of the Virginia capes—

she would have to pay exactly the same pilotage to Hampton Roads and from Hampton Roads to a Maryland port.

3. *It is always to be held in mind that it is optional* for the vessel in this case to take the pilot or not, as it pleases; that "*must*" applies only to payment of fees if the pilot is taken; and that a vessel is in the Virginia waters at Hampton Roads "where the Virginia pilots be," and where Maryland pilots do not be.

This being the situation, and the vessel having determined that she does want a pilot to the Maryland port from Hampton Roads, how is she to get him?

She can only get him by voluntarily taking him.

And if she does voluntarily take him, why should she not pay him?

There is no allegation that the rates are unreasonable, nor any complaint of their amount. Their reasonableness is admitted. And how is it discrimination against a State to let the vessel going to its port lie free of charge in inland waters of another State, and there have a pilot ready to serve the vessel if she wants him and voluntarily takes him?

4. *Discrimination in the rates of pilotage* as between States cannot be predicated of such a provision. For what is "discrimination"? Let its definition answer. Worcester in the dictionary says it is:

> "The arbitrary imposition of unequal tariffs for substantially the same service."

A. T. Hadley says:

> "A difference in rates not based upon any corresponding difference in costs constitutes a case of discrimination."

No such discrimination appears here as between States, and there is no imposition of any kind.

5. These views are sustained by the tenor of the section that contains this item.

That section simply fixes rates, and it does fix them within all the waters of Virginia and between all the ports of Virginia in all cases which the General Assembly has thought proper and expedient to regulate in this particular.

And the sum of the matter is that Virginia in this item of her statute *has prescribed a reasonable rate to be paid by a vessel desiring and taking a pilot in Hampton Roads to a port in another State.*

If this item could be impugned we would answer:

First. That the whole pilotage code of Virginia would be legally perfect without it; and, if imperfect with it, can be made perfect by casting it out.

Second. That it is the *compulsory pilotage* system between the Virginia capes which this case brings up for adjudication; that no party is here having an interest to defend the inland and optional pilotage system, and that it is not involved in the pleadings or in any legal bearing of this case.

IX.

IF A DISCRIMINATING REGULATION BE ABROGATED, ALL OTHERS NOT DISCRIMINATING REMAIN IN OPERATION.

Authority is abundant and specific for the principle which we have stated, that if one item of the schedule of pilot's fees applicable to passage to a particular port is invalid it will be cast out, and the valid schedule will not thereby be cast out with it.

Modifications of the Virginia statutes occur by operation of Federal law every time Congress places an additional

limitation upon them, as in 1837, 1866, and 1871, but the portions of them untouched by the new limitations remain valid.

If the Virginia pilotage system were valid before this item was put into it, so will it be valid when this item is extracted from it.

A mere excrescence can be lopped off of a statute as readily as a barnacle can be scraped from the hull of a ship, and each, so far from being hurt, become all the better for the operation.

The Supreme Court of the United States over fifty years ago, in the leading case we have cited (*Cooley vs. Board of Wardens*, 12 Howard, 299), expounding the Pennsylvania pilotage statute and holding it valid, though the system applied to vessels coming into port from sea, was not applied to ports on the Delaware river. So, even if in this case the item that relates to the vessel passing from Hampton Roads to Maryland port carried down with it other items of inland pilotage from Virginia port to Virginia port or left a tract of inland waters without pilotage provisions, we would still have the compulsory system from sea inland and from inland to sea, in perfect and uninterrupted and undiscriminating integrity.

Illustrations of the Principle.

Other cases have happily defined and illustrated this doctrine, and the *Alameda*, 32 Federal R., 33 (1887), confirming the decision of the district court in 31 Fed. R., 366, is one of them.

In that case Judge Field, of the United States Supreme Court, holding the circuit court of the northern district of California, gave the opinion and held that the act of California in exempting that State, and also Washington, Oregon, and Alaska, from the operation of the pilotage system that covered vessels from all other ports that were in the coasting

trade and entering the California port, discriminated against the States that were not also exempted, but nevertheless that it left valid the untouched regulations of pilotage. Speaking of the Federal statute that inhibits the adoption by any State of regulations which make discriminations in the rates of pilotage between (1) vessels sailing between the ports of one State and (2) vessels sailing between the ports of different States, he said:

> "It abrogates all existing regulations thus discriminating. But it has no farther operation; it in no respect impinges upon any other regulations or touches the general system of pilotage or half pilotage, with respect to vessels engaged in foreign commerce.
>
> "The prohibited discrimination, if previously made, is abrogated; if subsequently made it is inoperative to defeat regulations otherwise valid" (p. 333).
>
> * * * * *
>
> "The case is essentially different from *Spraigue v. Thompson*, 118 U. S., 90. There it was sought to charge a coasting vessel which was excepted from pilot charges by the Code of Georgia; here it is sought to except from such charges a vessel engaged in foreign commerce, because of an exemption by the Code of California in favor of certain coasting vessels—an exemption contained in an independent section" (p. 334).

In *Olsen vs. Smith*, 68 S. W. Reporter, 320 (1902), the Texas court of civil appeals held that the Texas statute exempting from extra pilotage all vessels owned in Texas when arriving from or departing to any port in the State, and also the statute subjecting certain coastwise steam vessels to pilotage, were in conflict with section 4237 of the Revised Statutes of the United States prohibiting discrimination against States, and also in conflict with section 4444, Revised Statutes of the United States, providing that no State shall impose on pilots of steam-vessels any obligation to procure a State or other license in addition to that issued by the United States; but that court also observed and followed

the saving principles of Judge Field's decision above quoted, and applied it to preserve in force that portion of the Texas pilotage system that was not touched by the discriminating and invalid regulations. Consequently it held that the regulation not touched by the impugned discrimination, and that gave a pilot half-pilotage fees against a vessel *outside the bar* which refused his services, remained intact and valid.

The judgment rendered in this case was recently approved by the Supreme Court of the United States in the case of Olsen *vs.* Smith, not yet reported.

And in the case of *Williams vs. The Lizzie Henderson*, Fed. Cas. No. 17726*a*, it was said:

> "It is not for courts to decide what the law should be, but what it is; and the only question under consideration is whether the act of 1879 is valid or not. If not, it has not been claimed but what the pilot laws in force prior to the passage of that act were valid and binding, and, if it is invalid, they are still in force. And this I consider to be the case. The amendment of 1879 in no way changed the pilotage laws, as it, in effect, only attempted to establish a discrimination which I consider to be contrary to the Constitution, hence invalid, and the pilotage is due under pre-existing regulations * * *."

The legislature of Virginia intended the pilot systems devised by it, both the compulsory system that applies between the sea and the inland waters, and the optional system that applies within the inland waters alone, to be operated according to the details set forth in the statute. But if an inland detail be invalid, that is no reason to suppose that it did not intend all other inland details to remain, and the whole system as between the sea and inland ports, which is in no respect impugned, to remain also. And when all the unimpugned details do remain there is no kind of discrimination in them as to rates between States, and not a single State or port is put in an invidious relation.

Not only in pilotage enactments, but in all kinds of enactments, whether civil or criminal, the courts will preserve all sound and unobjectionable parts of statutes, and it is scarce conceivable that any court will tear down the sea and inland pilotage system and the sound parts of the inland system because of a single objectionable item.

We are willing to rest on this topic with the eminently wise and just declaration of Judge Field that the act of Congress applicable here "abrogates the discriminating regulation," but "has no farther operation," and upon the opinion of the court in Olsen *vs.* Smith. In that case Mr. Justice White said:

> "It is obvious from the provisions of the Revised Statutes, (sec. 4237,) forbidding discrimination in State legislation concerning pilotage, that Congress did not intend by that section to revoke the power of the States on the subject or to abrogate existing pilotage laws of the several States containing discriminatory provisions, but only to abrogate the provisions making the discrimination. This results since the statute, after first generally prohibiting regulations by any State discriminating 'in the rate of pilotage or half pilotage between vessels sailing between the ports of one State and vessels sailing between the ports of different States, or any discrimination against vessels propelled in whole or in part by steam, or against national vessels of the United States,' in careful language annuls and abrogates only 'all existing regulations or provisions making any such discriminations.'
>
> "And this construction of the section in question disposes also of the argument that if the statute be accepted as interpreted by the State court, it is nevertheless repugnant to the law of the United States, since, if the exceptions found in the State statute are eliminated, then those statutes impose pilotage charges upon all vessels, and hence subject coastwise steam vessels of the United States to such charges, although they are expressly exempted therefrom (Revised Statutes, 4444). But the provisions of

that section clearly contemplated that by existing State laws, coastwise steam-vessels of the United States were subject to pilotage charges, and proposed, whilst withdrawing such vessels from pilotage charges, not in other respects to interfere with the State laws on the subject of pilotage. This is plainly the result of the following provision contained in the section in question:

"'Nothing in this title shall be considered to annul or affect any regulation established by the laws of any State, requiring vessels entering or leaving a port in any such State other than coastwise steam vessels, to take a pilot duly licensed or authorized by the laws of such State.'"

X.

PILOTAGE LAWS SHOULD BE LIBERALLY CONSTRUED FOR THE PUBLIC SAFETY.

In *Smith vs. Swift*, 8 Metcalf, 332, the supreme court of Massachusetts has aptly said respecting pilot laws that "*they are not in derogation or contravention of common-law rights*," that "*they do not proceed from the common law*," but "*are to be classed under the head of the maritime law, which is not the particular law of England, but a part of the law of nations:*" and Hubbard, J., delivering its opinion, thus emphasized the policy of this liberal construction:

> "This subordinate but highly useful branch of the marine law, regulating pilots and pilotage, has long been enforced by positive statute provisions; and FROM THE VERY NATURE OF THE SUBJECT THESE PROVISIONS ARE ENTITLED TO A LIBERAL CONSTRUCTION IN ORDER TO GIVE FULL EFFICIENCY TO LAWS ESPECIALLY DESIGNED TO PROMOTE THE INTERESTS OF COMMERCE, AND TO PROTECT THE LIVES AND PROPERTY OF THE CITIZENS ENGAGED IN IT."

The seamen upon the vessels that encounter the perils of the sea and of other dangerous waters; the passengers upon

them, as well as the shippers and consignees of their costly cargoes of merchandise; the owners of the vessels themselves; the companies who insure the vessels and the lives and property upon them; the ports which are interested in their exits and entrances, are all deeply and intimately concerned that there shall be well-designed and well-administered systems of pilotage.

Such systems are as necessary for navigable waters as systems of police are necessary for great and crowded cities, and the public weal is as much concerned in the maintenance of pilotage on water as in the maintenance of police on land.

The establishing of pilotage systems is indeed a part of the police power of the States that existed solely in them before they adopted the Federal Constitution. Since then it exists in both the Federal and State governments, subject to the paramount power of Congress, as heretofore explained. When created, the system is a part of the police establishment of the State, provided for dangerous and difficult waters. It is in aid of the public safety; and the notion that the whole of it may be stricken down by a court because of some illegal item in its schedules that goes not to the foundation or integrity of the statute is scarce less than appalling.

Lord Esher has said of compulsory pilotage that—

> "It was not enacted for the protection *only* of ships; it was enacted for the protection of ports; of commercial ports, and also of naval ports; of commercial ports in particular, because if a vessel is wrecked and lost and sunk near to the entrance, or within the entrance of a commercial port, she is not only lost herself, but she is a great danger and obstruction to the port and to other vessels, and would interfere with the commercial business of the port."
>
> *The Charlton*, 8 Asp. M. C., 29.

When we consider the amount of money expended to diminish the dangers and improve the navigation of the

Virginia coast, the channel and the inland waters and ports, which are affected by the pilotage laws of Virginia and by the questions at issue, and when we contemplate how great are the dangers that yet remain to navigators, there is a practical warning to reinforce the injunctions of the courts in favor of liberal construction and in support of the system which Virginia has gradually developed. A just court would only yield to a judgment that crushed it because of imperious judicial obligation under clear law.

XI.

THE PLAINTIFF IN ERROR'S "ANALYSIS" OF THE VIRGINIA PILOT LAW.

We are confident that no discriminating provision as to the compulsory rates of pilotage can be found anywhere in the Virginia statute.

To show such discrimination the plaintiff in error contends that—

> (1) "There is not an actual port of any commerce in Virginia from which a vessel bound to Norfolk is compelled to take a pilot."
>
> Brief, p. 15.

On the next page (16) he admits that there is one port, Chincoteague, on the Virginia seacoast. But he immediately wipes it out by declaring it is an unimportant one, with no commerce.

The pilotage law was enacted with a view to ports that are and ports that may be. It is as to vessels voyaging between them that it applies, and, of course, if there is no port there can be no discrimination as to rates going to it or going from it, or with other ports in relation to it.

Ports come and ports go. Ruins mark many that have been; forests and swamps and deserts mark many that will

be. In twenty years from now many ports may exist on the Virginia seacoast and many ships may be coming to and going from Chincoteague. Virginia Beach, on the Virginia seacoast, south of Cape Henry, is now the terminal of a railroad from Norfolk. It may become a great port. And how many ports there are on the Virginia coast is not in any sense a material question to this controversy. This court could not construe decisions to be valid or invalid as cities rise or fall, or construe statutes according to the ever-changing movements of civilization.

(2.) Again the plaintiff in error contends that under the Virginia statute—

"A vessel sailing from the Virginia capes to Norfolk must pay pilotage if hailed at the proper point."

But that—

"A vessel sailing from Cape Charles City to Norfolk need not pay pilotage though she traverses practically the same waters."

Plaintiff in Error's Brief, p. 17.

This is illusive. The vessel sailing from the Virginia capes to Norfolk passes through the capes of Virginia from the sea to the inland waters and over the tract of water as to which compulsory pilotage applies in all cases. The vessel sailing from Cape Charles City to Norfolk does not traverse, really or practically, "the same waters," but *only inland waters;* and the difference between the sea or ocean and the inland waters is a difference which pilot laws generally recognize and which have always been recognized in Virginia and by the courts.

(3.) The plaintiff in error also contends that—

"A vessel sailing between the capes of Virginia and Baltimore must take a pilot as far as Smith's Point."

Whereas—

> "A vessel sailing between the capes of Virginia and Alexandria need not take a pilot though she traverses exactly the same waters as far as Smith's Point and the long and difficult navigation of the Potomac in addition."
>
> Plaintiff in Error's Brief, p. 17.

There is a plain answer to this argumentative statement, and it is found in the act of Congress of March 2, 1837, which is now section 4236 of the U. S. Revised Statutes. It provides that—

> "The master of any vessel coming into or going out of any port situate *upon the waters which are the boundary between two States* may employ any pilot duly licensed or authorized by the laws of either of the States bounded on such waters, to pilot the vessel to or from such port."

Section 1990 of the Code of Virginia, repealing compulsory pilotage as to the Potomac river, was therefore enacted in order to conform our law to the paramount law enacted by Congress in 1837.

If a Maryland pilot contests for employment with a Virginia pilot over this route, we may then consider a question which does not now arise and which has no relation to this suit.

(4.) Still again the contention is:

> "A vessel from West Point to sea must take a pilot,"

but—

> "A vessel from West Point to Norfolk or Cape Charles City need not take a pilot."
>
> Plaintiff in Error's Brief, p. 17.

This is mere truism. Of course a vessel from West Point to sea must take a pilot, because West Point is on York

river, on the inland waters of Virginia, and the sea is beyond the capes between which the tract of pilotage lies. Of course, also, a vessel from West Point to Norfolk or Cape Charles City is not compelled to take a pilot, because all three places—West Point, Norfolk, and Cape Charles City—are on the inland waters of Virginia, where compulsory pilotage is inapplicable. It is also true that a vessel from Alexandria, or Baltimore, or any other place on the inland waters, need not take a pilot to Norfolk or Cape Charles City, all of these places being within the inland waters.

There is not the slightest suggestion of discrimination that arises as between

(1) *vessels sailing between the ports of one State*, and

(2) *vessels sailing between the ports of different States*,

over the piloted tract of waters. The contention is brought down to the simple allegation that a State cannot require pilotage between the sea and inland ports; and such contention has been fully considered and answered by all the decisions of this court on this subject from the case of Cooley *vs.* The Board of Wardens, 12 How., 299 (1851), to Olsen *vs.* Smith, decided at this term. And this case is free from such exempting provisions as appeared in the first case mentioned, which was adjudicated over fifty years ago and has been uniformly followed. (See *ante*, p. —.)

It is stated on page 7 of the brief of the plaintiff in error that—

> "An analysis of these statutes shows that all vessels, (*except coasting vessels with a pilot license*), inward bound from sea must take a Virginia pilot as far as Smith's Point [mouth of Potomac], Yorktown, Newport News, Norfolk, or any intermediate point."

It is also stated that—

> "All vessels outward bound to sea must take a Virginia pilot as they pass these points, no matter where their voyage commences."

Both of these statements are but partially correct, for the vessel is not bound to take a Virginia pilot if coming into or going out of any port "*situate upon the waters which are the boundary between two States*," as already shown in the quotation of § 4236, Revised Statutes, and as appears also from § 1990 of the Virginia Code, already cited. Any argument founded on this mistaken statement of fact falls with its refutation.

Sections 1966, 1967, 1969, and 1990 of the Virginia Code.

We are further told that an analysis of sections 1966, 1967, 1969, and 1990, of the Virginia Code, shows that the following vessels are exempted from taking pilots:

> "1st. All vessels from Newport News, Yorktown, Urbanna or Smith's Point to any points above those points, respectively."

Answer. Vessels are only released from compulsory pilotage between the points named. They may employ a pilot if they see fit. Unquestionably a State may define the waters upon which pilotage is necessary; and this allegation has no legal consequence and involves no manner of discrimination as to rates or anything else, as it applies to all vessels without other distinction than that made by the Federal statute.

The provisions of the Pennsylvania law, that "every ship or vessel coming from or bound to any foreign port or place, or every ship of seventy-five tons or more, sailing from or bound *to any port not within the River Delaware*, shall be obliged to receive a pilot," and imposing pilot fees for services rendered, were based upon the same principle that is basic to the Virginia statute. The cases are similar except the James, York, Rappahannock, and Potomac rivers are involved in this case instead of the Delaware. And unless the plaintiff in error expects to overrule the decision in

Cooley *vs.* The Board of Wardens, 12 How., 299, by which the Pennsylvania statute was upheld, then there is no point in this statement.

"(2.) Vessels holding a coasting license."

Answer. The section referred to here is § 1967 of the Code of Virginia, and is as follows:

> "SEC. 1967. *Issue of license to coasting vessel by pilot's agent at Norfolk and Richmond; pay of agents.*—Pilots shall appoint agents, one for Norfolk city and one for Richmond, who shall grant licenses to coasting vessels trading in all the rivers of this State; for which licenses such agents shall receive ten cents per ton for one year; and coasting vessels having such licenses shall be free to sail without pilots to or from sea; but all vessels sailing under a coasting license, of the burden of seventy tons or more, coming from or going to sea, without having obtained a license from such agent, shall be subject to the same regulations and pilotage as registered vessels belonging to citizens of the United States."

This exemption is a perfectly proper one, unless Cooley *vs.* The Board of Wardens, 12 How., 299, and Olsen *vs.* Smith, recently decided, are to be overruled. The first of these cases upheld a statute which exempted all vessels "*engaged in the Pennsylvania coal trade*" from both "health and pilot charges." And this court held that the exemption was based on sound policy and was within the purview of the Federal statute of 1789.

And in Olsen *vs.* Smith, Mr. Justice White said:

> "Neither the exemption of coastwise steam vessels from pilotage resulting from the law of the United States; nor any lawful exemption of coastwise vessels created by State law, concerns vessels in the foreign trade; and therefore any such exemptions do not operate to produce a discrimination against British vessels engaged in foreign trade and in favor of vessels of the United States in such trade."

Neither can it be said that the exemptions from the pilotage law of "licensed coasting vessels trading in all the rivers of this State" concerns vessels which are not so engaged. Besides, any vessel desiring to engage in "trading in all the rivers of this State" could easily get a license to do so, and there is no aspect in which an unlicensed vessel of Virginia, or any other State, or of a foreign nation, is discriminated for or against in the "rate of pilotage" or otherwise.

"(3.) *Vessels bound to any point on the Potomac.*"

Answer. Please see again § 4236 of the United States Revised Statutes and § 1990 of the Code of Virginia, which have already been quoted and cover this point.

Comment is made upon the fact that—

> "It also appears that the following vessels are exempt from pilotage, for the reason that such vessels would not be *inward bound from sea*, and the further reason that no pilotage rates are prescribed by the statutes for such voyages:
>
> "1st. Vessels plying between Virginia ports.
>
> "2d. Vessels plying between Virginia and Maryland ports.
>
> "The following vessels, under the pilot law have a reduced rate under sections 1969 and 1975:
>
> "1st. Vessels coming to Hampton Roads seeking (half pilotage).
>
> "2d. Vessels coming to any port of this State to coal (half pilotage).
>
> "3d. Vessels between Newport News and Norfolk, loading or finishing loading (optional whether to take any pilot or not and a fee of only $10 if a pilot is taken).
>
> "4th. Vessels from the naval anchorage to the navy yard (a special rate of $20)."

This is a mere summary, in part, of propositions already answered in detail, or of others to which no specific objection is made, and to which no valid objection can be made.

As there is no suggestion accompanying the comment that there is anything in these provisions which makes any discrimination in the rates of pilotage between—

a. Vessels sailing between the ports of one State

and

b. Vessels sailing between the ports of different States,

there is nothing for us to answer. We only call attention to these accumulations of ostensible points in the brief of the plaintiff in error, because their frequent recurrence carries an implication that they are regarded as serious. In fact, they are but mere citations of statutory facts which have no bearing on the issue.

XII.

SECTION 4236 OF THE REVISED STATUTES, AND PORTS SITUATE UPON WATERS WHICH ARE THE BOUNDARY BETWEEN TWO STATES.

As a last stand the plaintiff in error repeats his contention that the pilot law of Virginia violates § 4236 of the Revised Statutes. That section declares that—

> "The master of any vessel coming into or going out of any port situate upon the waters which are the boundary between two States may employ any pilot duly licensed or authorized by the laws of either of the States bounded on such waters to pilot the vessel to or from such port."

The allegation is strong. The specification of violation is *nil.* The evidence is *nil.* The proof in the case is *contra.* Compare with this statute of the United States the statute of Virginia, which is § 1965 of the Code, and which requires two classes of vessels (other than a coasting vessel having a pilot license) to take the service of a pilot. That is to say—

> (1.) A vessel, "*inward bound* from sea, shall take the first Virginia pilot that offers his services, Cape

Henry bearing west of south, to Smith's Point, Yorktown, Newport News or Norfolk, or any intermediate point."

(2.) "Any such vessel *outward bound*, shall take the first pilot that offers his services at Smith's Point, Yorktown, Newport News or Norfolk, or any intermediate point, to sea."

The comparison suggested reveals these facts:

I. That the field of compulsory pilotage is bounded by a line running—

(1.) From Cape Charles across the strait connecting the sea and Chesapeake bay to Cape Henry;

(2.) Thence from Cape Henry, the southern cape of Virginia, to Norfolk, at the mouth of the James river, a distance of about 27 miles;

(3.) Thence across the mouth of the James river to Newport News, a distance of about 12 miles;

(4.) Thence from Newport News to Yorktown, at the mouth of the York river, a distance of about 12 miles;

(5.) Thence from Yorktown to Smith's Point, at the mouth of the Potomac river, a distance, as the bird flies, of about 50 miles;

(6.) Thence to the beginning at Cape Charles, a distance of about 60 miles.

II. Vessels bound from sea inwardly to these waters must take a pilot.

III. Vessels outward bound from these waters must take a pilot.

IV. As to the waters of the James river above Newport News, the waters of the York river above Yorktown, and the waters of the Potomac river above Smith's Point, they are differently dealt with by both the United States and the Virginia statutes.

We have already pointed out how vessels voyaging to points on the Potomac are affected by reason of section 4236 of the Revised Statutes of the United States, above quoted, and section 1990 of the Virginia Code, conforming thereto. Points on the waters of the James and York rivers, which are not boundaries between two States, are under the operation of section 1966 of the Code of Virginia, which declares that—

> "No master shall be required to have a pilot to conduct his vessel above Newport News, Yorktown, Mobjack bay, Urbanna, or Smith's Point, but he may, himself, or by any person regularly employed on board, pilot his own vessel, or he may employ the services of any towboat, to tow his vessel to her port of destination above any of the above-named points."

And there is nothing in any case on this subject to indicate that such regulations are not perfectly correct from any standpoint; for, from the leading case on this subject [Cooley *vs.* The Board of Wardens, 12 How., 299, (1851),] to the latest case decided at this term (Olsen *vs.* Smith), this court has recognized the underlying policy of pilot laws—

> "as imperatively demanding that diversity which alone can meet the local necessities of navigation."

The application of the Virginia statute is a picture of this principle.

XIII.

THE CASE AT BAR DISTINGUISHED FROM CASES CITED UNDER § 4236.

Looking again at the map, we find that the northernmost point of a straight line that runs from Cape Charles to Cape Henry is about 60 miles from the southern boundary line of Maryland. Within that line is the whole field of pilot-

age. All of the land and all the waters are within Virginia, and at no point within this distance is there any boundary of water between Virginia and Maryland.

To put upon § 4236 of the U. S. Revised Statutes a construction which would apply to these waters and lands within Virginia would be to prolong and extenuate the statute beyond its natural purpose and to forget § 4235 of the Revised Statutes, which preserves the provision of 1789, that—

> "Until further provision is made by Congress, all pilots in the bays, inlets, rivers, harbors and ports of the United States shall continue to be regulated in conformity with the existing laws of the States respectively WHEREIN SUCH PILOTS BE, or with such laws as the States may respectively enact for the purpose."

If it be replied to this that § 4236 of the Revised Statutes has already been extended, by construction, in its operation to those waters which, while not in fact *separating boundaries* between two States, are connected therewith, we rejoin that the farthest range of judicial interpretation and the farthest range of legal contention has never carried such construction beyond the point of deciding that, IF THERE BE within the extended waters pilots of different States having a common water boundary, the master of the vessel coming into or going out of any port situate upon such waters may employ any one of those pilots, *provided he be* "duly licensed or authorized by the laws of either of the States bounded on such waters, to pilot his vessel to or from such port."

THE FACTS IN THIS CASE AS IT COMES BEFORE THIS COURT DO NOT BRING IT WITHIN THE TERMS OF § 4236 OF THE REVISED STATUTES.

This case is not predicated upon any such condition as would make it possible, under § 4236, for the vessel entering the capes of Virginia to have refused to accept the services of Darden, the Virginia pilot, when he offered them.

There is not even a hint in the record that such condition existed.

No pilot but Darden appeared in the waters near the capes of Virginia to hail the incoming vessel.

No duly licensed pilot of Maryland either appeared or offered his services, or was preferred, or appears to have been in those waters.

No question was ever raised as to a Maryland pilot being there, or as to the right of a Maryland pilot to be there, or as to the license or authority of any pilot but Darden.

The plaintiff in error has never at any time concerned himself about any Maryland pilot or about any pilot but Darden, nor has any Maryland pilot concerned himself about him.

The Plaintiff in Error Must Stand upon the Case He has Made.

The special demurrer to the declaration of Darden in the Court of Law and Chancery of the City of Norfolk, where this case originated, shows that, while it set forth in detail and under seven different headings its objections to the sufficiency thereof, it never even faintly suggested that it was any part of Darden's duty to allege that no other pilot but himself was there, or that no Maryland pilot was there, or that no duly authorized pilot of Maryland was there. In fact the demurrer recognized the correct legal principle that if there were matter of avoidance of an obligation

fixed by statute, and conformed to by the plaintiff in his declaration with strict compliance to statutory regulation, it was matter FOR HIM, THE DEFENDANT, TO SET UP AND PROVE.

It would be curious, indeed, and in defiance of the hoary and established principles of courts of law and equity alike, if the burden were thrown upon Darden to prove conditions with respect to the law of a foreign State, and with respect to strangers to that State, which might possibly be matter of colorable defense to his antagonist, which were of no concern to him, and which could raise no question for him to determine unless in fact a Maryland pilot, duly licensed and authorized, had presented himself to the incoming vessel, the *William Neely*, and entered into rivalry with him (Darden) for the employment to which he was entitled under the actual existing conditions.

THE PLAINTIFF IN ERROR ARGUES A MOOT CASE.

We are invited under this last contention of the plaintiff in error to cast out of court the case which he has made and to enter with him upon the moot question of a speculative case which he has, since his defeat, conjured up in his imagination. No doubt an ingenious lawyer might invent questions calling for consideration out of the Virginia and United States statutes which nowhere arise or are suggested in this record.

But it is not our task to consider such questions, and we respectfully suggest that it is not any part of the duty of this court to hear or to determine them. More errors have flowed from the tendency of judges, quite natural in itself, to make observations on conditions and questions not embraced within the record before them than from any other source.

CASES CITED BY THE PLAINTIFF IN ERROR WITH RESPECT TO § 4236 OF THE REVISED STATUTES.

And no case cited by the plaintiff in error that relates to § 4236 of the Revised Statutes, which we are now considering, has any application to the case stated, relied upon, and decided by the Supreme Court of Appeals of Virginia, and which this court is now reviewing.

The *Clymene*, 9 Fed., 164 (1881), was first decided by the U. S. District Court for the Eastern District of Pennsylvania, by Butler, District Judge.

In that case a Delaware pilot offered his services to the *Clymene* to conduct her to Philadelphia, her port of destination. His services were accepted and he did pilot the steamer to that city from the entrance to Delaware bay. He sued for his pilotage charges. The master of the steamer admitted the services, but pleaded that there was a Pennsylvania statute prohibiting any one from acting as such pilot without a Pennsylvania license. The Delaware pilot was sustained and the reasons therefor are summed up in the syllabus of the case of the *Clymene*, 12 Fed., 346 (1882), in which the Circuit Court for the Eastern District of Pennsylvania confirmed the judgment in favor of the Delaware pilot by the District Court.

The syllabus is as follows:

> "1. The act of Congress of March 2, 1837, authorizing the master of a vessel bound to or from a port situate on waters which are the boundary between two States to employ a pilot licensed by either State, applies to the pilotage laws of coterminous States situated upon a navigable river which is not a separating boundary between them.
>
> "2. A pilot licensed by the State of Delaware may recover for services in piloting a vessel up the Delaware bay and river to Philadelphia, notwithstanding a statute of Pennsylvania prohibits any one from acting as such pilot without a Pennsylvania license."

If in this case a Maryland pilot had appeared, if he had been duly licensed and authorized, if he had offered his services to the *William Neely* and had been accepted, then and then only could a case have arisen in which it would be necessary for the court to decide whether or not the conditions in this case were such as to bring such Maryland pilot within the provisions of the act of Congress of March 2, 1837, now § 4236, of the Revised Statutes.

In the *Abercorn*, 26 Fed., 877 (1886), in the U. S. District Court of Oregon, confirmed by the Circuit Court for the District of Oregon in 28 Fed., 384, the point decided is simply that:—

> "The Columbia river is a boundary between two States (Oregon and Washington) within the purpose and spirit of § 4236 of the Revised Statutes, and therefore the State of Oregon cannot require a vessel bound in or out of said river to take an Oregon pilot or pay him half, or any, pilotage IF THE MASTER THEREOF PREFERS AND DOES TAKE A WASHINGTON PILOT."

There is much virtue in IF. The Oregon pilot appeared; he was duly authorized; he offered his services to the master to pilot the *Abercorn* over the bar to the sea; the offer was refused; the vessel *accepted* a duly licensed pilot of the State of Washington who piloted the vessel and was duly paid by the master. The refused Oregon pilot claimed the right to recover under the Oregon law on account of the refusal to receive him. It is evident that no such case arises here, and the words "If the master prefers to and DOES TAKE a Washington pilot" contain the discriminating and determining point in the decision against the right of the Oregon claimant.

The case of the *South Cambria*, 27 Fed., 525, presents a conflict between a regularly licensed Delaware pilot and a similarly licensed Pennsylvania pilot. The Delaware pilot, who tendered his services first and was refused, claimed his fees. The master defended on the ground that he had the

right to select a pilot from either State bordering on Delaware bay and river, without reference to priority of offer by any such pilot. In this he was sustained, the ground of the decision being the right of the master to CHOOSE between rival pilots of equal right presenting themselves in due time for service. It is so stated in the opinion of Wales, J., page 528, where he points out that section 4236, the act of Congress in question, confers—

> "on the master of any vessel requiring a pilot the right of electing who shall serve him in that capacity."

He adds distinctively:

> "This was the object aimed at. The mischief to be suppressed was apparent and the remedy was equally so."

XIV.

CONCLUSION.

In conclusion, we respectfully submit to the court that no error has been shown in the decision of this case by the Supreme Court of Aypeals of Virginia, nor can any error be found therein.

In the opinion of that court, delivered by Buchanan, J., it is succinctly and clearly stated:

> "All vessels are subject to the same regulations and, under the same circumstances and conditions, are required to pay the same fees. There is clearly nothing in those statutes which expressly makes any discrimination between such vessels."

The identical questions were before that court that are now before this court, and we respectfully submit that a like conclusion should be reached.

R. C. MARSHALL, John W. Daniel
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For Defendant in Error.